Nos. 75-600 and 75-61

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN JOSEPH AND BRYAN ROBERTS, PETITIONERS

v.

UNITED STATES OF AMERICA

VICTOR GANEM AND RICHARD DICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

All petitioners contend that evidence obtained from a court-approved wire interception should have been suppressed because the intercept order incorrectly stated that the application had been authorized by a specially-designated Acting Assistant Attorney General. Petitioner Ganem contends that evidence derived from the same wire interception should have been suppressed as to him because he was not named in the intercept application and order. Petitioners Joseph and Roberts contend that the evidence was insufficient to support their convictions.

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of operating an illegal gambling business, in violation of 18 U.S.C. 1955, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371. Each petitioner was fined $1,000. In addition, each was sentenced to imprisonment for two years on each count; the sentences were suspended, and each petitioner was placed on probation for five years. The court of appeals affirmed (Pet. No. 75-600 App. A).

The facts are set forth in the opinion of the court of appeals and may be summarized as follows. Petitioner Richard Dick, along with three other individuals who were not tried in the instant prosecution, operated a bookmaking business in Victoria, Texas. Dick and his partners used telephones located at a house-trailer and at one of their homes to solicit and accept wagers on the outcomes of high school, college, and professional athletic events. Petitioner Victor Ganem assisted them by soliciting wagers for them from the patrons of his pool hall in Victoria and by making the appropriate collections or pay-offs on those wagers. Petitioners John Joseph and Bryan Roberts, who conducted separate gambling operations in Austin and Dallas-Fort Worth respectively, traded "line" information[1] and exchanged "lay-off" bets [2] with the Victoria bookmakers.

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[1]A bookmaker's "line" is the handicap he gives his bettors on a given wager. For example, a line of "6 Harvard" on the Harvard-Yale football game means that those customers betting on Harvard will win their bets only if Harvard prevails by more than 6 points.

[2]One bookmaker customarily places a "lay-off" bet with another bookmaker when he has received substantially more bets on one side of a contest than on the other and desires to eliminate the risk of heavy loss. For example, if a bookmaker received bets of $100,000 on Harvard and only $40,000 on Yale in a Harvard-Yale game, he might place a lay-off bet of $60,000 on Harvard with another bookmaker in order to balance his books.

The evidence was derived largely from a court ordered electronic interception of the telephones used by petitioner Dick and his partners. The application for the order and the order authorizing the interception indicated that Acting Assistant Attorney General Henry Petersen had been specially designated by Attorney General John Mitchell pursuant to 18 U.S.C. 2516 to authorize the application (R.A. Pl. 202-212).[4] In fact, the Attorney General had personally approved the application request, and directed Petersen to issue the formal authorization (Gov't Supp. Br. 17-18).[5]

1. Petitioners contend (Pet. No. 75-600, p. 9; Pet. No. 75-611, pp. 9-10) that the evidence derived from the court-ordered wire interception should have been suppressed under 18 U.S.C. 2518(10)(a)(ii) because the order authorizing the interception was insufficient on its face. They argue that an Acting Assistant Attorney General does not possess the requisite statutory authority to authorize wire interception applications and that an intercept order identifying an Acting Assistant Attorney General as the person who authorized the application is therefore facially deficient. Petitioners Joseph and Roberts argue in the alternative that the order was insufficient on its face because Petersen's authority as Acting Assistant Attorney General had lapsed under the Vacancies Act, 5 U.S.C. 3348, at the time application was made to the district court. These deficiencies, they claim, require suppression of the evidence even though the application was in fact authorized by the Attorney General.

The transcripts of the interceptions indicate that the Victoria bookmakers placed lay-off bets with the Dallas-Fort Worth and Austin operations, although petitioners introduced evidence indicating that the Victoria books were not balanced during the period of the interceptions (Pet. No. 75-611 App. 13; Tr. 1332-1424).

[4]"R.A. Pl." refers to Record on Appeal, Pleadings Appendix.

[5]"Gov't Supp. Br." refers to the government's supplemental brief in the court below, which we are lodging herewith.

The same contention was made in *Vigi* v. *United States*, No. 75-101, certiorari denied October 20, 1975, and similarly does not warrant review here.[6] The order was not facially invalid, since an Acting Assistant Attorney General may lawfully be specially designated to authorize an application for an intercept order. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.[7] But even assuming *arguendo* that the order here was facially insufficient, suppression would not be required. Since the Attorney General actually authorized the application at issue here, this case does not involve any "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, 416 U.S. 505, 527. See also *United States* v. *Acon*, 513 F.2d 513, 516-519 (C.A. 3); *United States* v. *Robertson*, 504 F.2d 289, 291-292 (C.A. 5), certiorari denied, 421 U.S. 913. The court below thus correctly held (Pet. No. 75-600 App. 22) that "the congressional intent [to limit the use of wiretap] is satisfied when the head of the Justice Department personally reviews the proposed application" (quoting from *United States* v. *Robertson, supra*, 504 F.2d at 292).

2. Petitioners Joseph and Roberts contend that their involvement with the Victoria bookmakers as shown by the evidence did not constitute a conspiracy to violate 18 U.S.C. 1955. This contention was correctly rejected by the court below, on whose opinion we rely (Pet. No. 75-600 App. 23-24):

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[6]We are sending petitioners a copy of our Memorandum in *Vigi*.

[7]Petitioners Joseph and Roberts incorrectly assume that an allegation that Petersen was not in fact the Acting Assistant Attorney General because of the operation of 5 U.S.C. 3348 attacks the facial validity of the order. Instead, such an attack attempts to look behind the facial validity of the order to demonstrate its actual invalidity. See *United States* v. *Chavez*, 416 U.S. 562, 573-574.

> Joseph [and] Roberts * * * helped the Victoria bookmakers by providing them with line and other gambling information. They served, too, as a means by which the Victoria bookmakers could increase, decrease or eliminate their risk on a particular event. A person who performs a necessary function other than as a mere customer or bettor in the operation of illegal gambling "conducts an illegal gambling business." *United States* v. *Jones*, 9 Cir. 1974, 491 F.2d 1382, 1384.
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> "The only exclusions intended by Congress were the individual player or bettor and not the professional bookmaker who also in the course of his business bets. * * * *"
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> *United States* v. *McHale*, 7 Cir. 1974, 495 F.2d 15, 18. While Joseph [and] Roberts * * * may not have been layoff bettors, they were more than individual players or bettors and consciously aided in the conduct of the Victoria bookmaking business.

3. Petitioner Ganem contends (Pet. No. 75-611, p. 7) that evidence derived from the wire interception should have been suppressed as to him because he was not named in the intercept application and order. The issue whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person whom the government has probable cause to believe it will overhear participating in conversations relating to the specified illegal activity is pending before this Court in five other petitions for writs of certiorari: *United States* v. *Bernstein*, No. 74-1486; *United States* v. *Donovan*, No. 75-212; *Anderson* v. *United States*, No. 75-500; *Malloway* v. *United States*, No. 75-509; and *Doolittle* v. *United States*, No. 75-513. For the reasons stated in our petitions in *Bernstein* and *Donovan*,[8] we contend that the "person, if known" who is required by

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[8]We are sending petitioners a copy of those petitions.

Section 2518(1)(b)(iv) to be identified in the application for the intercept authorization is the person who leases or commonly uses the telephone being intercepted; that is, the primary target of the interception. Petitioner Ganem was a person who called the bookmakers on the intercepted telephones from an outside, nonintercepted phone; he was not a primary target of the investigation. In any event, as we further argue in *Bernstein* and *Donovan*, the failure to name an individual in the application and order does not warrant suppression as to him of the evidence derived from the interception, in the absence of any showing of prejudice or government bad faith. *United States* v. *Doolittle*, 507 F.2d 1368 (C.A. 5), affirmed, 518 F.2d 500 (*en banc*), petitions for certiorari pending, Nos. 75-500, 75-509, and 75-513. The court below followed *Doolittle* and accordingly found it unnecessary to consider whether there was in fact probable cause to identify petitioner Ganem (Pet. No. 75-611 App. 12, n.1).[9]

Since the conflict between the circuits in *Donovan*, *Bernstein* and *Doolittle* is presented in our *Donovan* and *Bernstein* petitions, this Court may wish to hold the *Ganem* petition, No. 75-611, until it has acted on those petitions. If, after such action, the existence *vel non* of

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[9] We think it is clear that the record does not support petitioner Ganem's claim that the government had probable cause to believe he would be overheard. The record discloses only that F.B.I. Agent Alfred Gunn once interviewed Ganem about his gambling activities in April 1967, more than four years prior to the government's application for the interception involved here (Tr. 326-330). Although Agent Gunn regularly checked the activities of petitioner Dick and his partners during the 1967-1971 period in an effort to detect federal gambling law violations, he did not conduct further interviews with petitioner Ganem. Even assuming the government knew in October 1971 that petitioner Ganem remained an active bookmaker, there was no evidence indicating government awareness of any connection between Ganem's current gambling activities and the bookmaking business operated by those named in the interception application.

probable cause to name petitioner Ganem in the application is relevant, the case should be remanded to the court of appeals for further development of the record. But since the petition of Joseph and Roberts raises no similar pending issues, it is respectfully submitted that the petition for a writ of certiorari in No. 75-600 should be denied. Similarly, since there is no such issue in No. 75-611 as to petitioner Dick, that petition should now be denied as to him.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

Petitioner Ganem claims (Pet. No. 75-611, p. 6) that Agent Gunn saw him in the company of the Victoria bookmakers at the bookmakers' office on February 13, 1970. Although Gunn apparantly did testify to petitioner's presence at the February 1970 meeting (Tr. 439), this was a misstatement. Gunn had earlier made clear that the individual seen at the meeting was Emil Ganem, one of petitioner's relatives, and not petitioner (Tr. 338-339). Later, in response to questioning from petitioner's attorney, Gunn reiterated that Emil Ganem, rather than Victor Ganem, had been present at the February meeting (Tr. 498).